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Supreme Court of the United States

October Term, 1976

No. 76-524

IN THE MATTER OF THE TRUST KNOWN AS
GREAT NORTHERN IRON ORE PROPERTIES

CHARLES S. ARMS and ELIZABETH P. ARMS,
Petitioners,

vs.

WILLIAM W. WATSON, LOUIS W. HILL, JR.
HARRY L. HOLTZ, JOSEPH S. MICALLEF,
Trustees of the Great Northern Iron Ore Properties Trust
and
BURLINGTON NORTHERN, INC.,
Respondents.

ARMS REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Three points destroy the argument by which Respondents hope to escape review:

1. The Railroad and, strangely, ***even the Trustees*** (in violation of their duty to the certificate holders, for whom they are trustees) **urge a reading of the Commodities Clause** of the Hepburn Act that growing numbers of Justices of this Court have rejected in the cases the Railroad now cites.

In every appearance of the Commodities Clause in this Court the view expressed by the first Mr. Justice Har-

lan in dissent in *United States v. Delaware and Hudson Company* (1909), 213 U.S. 366, has gained adherents—until now they are eight, namely: Justices Harlan, Stone, Brandeis, Cardozo, Rutledge, Black, Douglas and Murphy. Mr. Justice Harlan put the issue this way:

> "In my judgment the act, reasonably and properly construed, according to its language, includes within its prohibitions a railroad company transporting coal, if, at the time, it is the owner, legally *or equitably*, of stock—certainly, if it owns a majority or all the stock —*in the company which mined,* manufactured or produced, and then owns, the coal which is being transported by such railroad company. *Any other view* of the act will enable the transporting railroad company, *by one device or another, to defeat altogether the purpose which Congress had in view,* which was to divorce, in a real, substantial sense, production and transportation, and thereby to prevent the transporting company from doing injustice to other owners of coal."* (213 U.S. at 419)

The Railroad and the Trustees read out of the statute the prohibition barring *"any"* interest, *"direct or indirect"* in the Railroad. The Minnesota Supreme Court has adjudged the railroad that hauls the ore *does* have an interest in these ore lands, establishing either violation of the statute or erosion of it to nothing.

What is accomplished by the argument of the Railroad and the Trustees is not only to despoil the 10,000 certificate holders of the right to come into possession of these vast iron ore lands, and, perhaps worse, stake out so easy a route around the statute that it were better the statute be repealed altogether rather than left an empty promise to the public.

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*Emphasis supplied throughout.

2. The Commodities Clause is squarely in issue. The pretense of the Trustees and the Railroad that the Commodies Clause is not in issue is destroyed by the Minnesota Supreme Court's opinion pointing out it was the Commodities Clause "upon which the court particularly focused * * *." (See page 4 of the Trustees' Brief and Cert. App. 9.)

The Commodities Clause issue is here on the authority of *Raley v. Ohio* (1959), 360 U.S. 423, where the Court ruled:

> "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." 360 U.S. at 436.

3. The Railroad is inescapably in violation of the Commodities Clause for it is on both sides of the transaction. The Railroad hauls the ore. It plays the leading role in setting the freight rates at which the ore is hauled.

In addition, the Railroad has insisted upon, and has regularly exercised, the right to pass on leases granted by the Trustees and on operating agreements thereunder.

The Trustees asked the Railroad to consent to the making of leases by the Trustees:

> "upon such terms and conditions and for such periods of time (whether or not such leases may endure for periods extending beyond the probable or actual termination of said trust) as the trustees from time to time under said trust agreement may consider necessary or proper for the orderly use and development of the trust estate." (B-N Ex. 56 a and b.)

The Railroad *refused.* It instructed the Trustees:

> "we would like to review each contract as it is prepared." (B-N Ex. 56c.)

In the period 1960 through 1971, when the Record closed, the Railroad passed on, and approved, fourteen

leases proposed to be granted by the Trustees. (B-N Ex. 56 g, o, u, v, w, x, y, gg, ll, oo, uu, zz, eee and jjj.) The Railroad's corporate records show that the Board of Directors passed on and approved five of the fourteen leases (B-N Ex. 56 l, ee, nn, ss and xx) and the Executive Committee of the Board of Directors passed on the remaining nine. (B-N Ex. 56 d, t, jj, ccc and iii.)

In view of the Railroad's meticulous supervision of the mining of the ore it hauls to market, the Railroad's pretense (Burlington Northern brief, page 7) that "the Commodities Clause is without controlling significance in the instant case" has a particularly hollow ring. Especially is this so since each time the Railroad passed on, and approved, iron ore and taconite leases and operating agreements under those leases, the Railroad's corporate minutes show:

> "The President stated that in 1899 ownership of certain property was vested in Lake Superior Company, Limited, which was a wholly owned subsidiary of this Company and which distributed income from said property to Great Northern shareholders. *As a result of the enactment of a law in 1906* forbidding, after June 1, 1908, the shipment by a railroad over its own lines of any articles or commodities owned by it except those for its own use, *iron ore properties then held by Lake Superior Company, Limited, were,* by trust agreement dated December 7, 1906, *put into trust for the benefit of Great Northern shareholders* to whom transferrable certificates of beneficial interest were issued, said trust being known as Great Northern Iron Ore Properties." (B-N Ex. 56 d, m, t, ff, kk, tt, yy, ddd and ggg.)

The Railroad, under the Minnesota Supreme Court decision, has a *direct* interest in the ore in place and a *controlling voice* in determining royalties and the conditions under which the ore it hauls is to be severed from the earth and turned over to it for transport.

This power the Railroad has exercised to the point of *requiring* the lessee, as a *mandatory requirement* (T 553), to ship the ore over the Railroad. Although the Trustees claim to have abandoned that requirement (Arms Ex. 64, page 3, Question 3), Frank Claybourne, counsel for the Trustees, in response to inquiry (T 544) said he had searched the leases and that some leases, running into the 1990's, "still contain that traffic clause * * *." (T 546)

And, in the "Memorandum of Trustees on Order to Be Made" submitted to the trial court on August 1, 1973, the Trustees urged upon the trial court (page 4):

> "In view of the grantor's interest *in retaining the traffic for Great Northern* railway and the fact that the first holders of certificates of beneficial interest were also stockholders of the railway company, *the Trustees have properly assisted such allocation of the traffic* without reducing the royalties payable by the lessees.
>
> These two objectives *have been served up to this date. The traffic has in fact been over the Great Northern Railway,* with no reduction of royalty. For the seven years from 1899 thru 1906, prior to the Commodities Clause of the Hepburn Act which precipitated the Trust, the Great Northern Railway, including its stockholders, received directly the benefit of both royalties and traffic.
>
> The present controlling intent is the managing of the Trust as a business mining venture *just as the railroad would have done* if there had been no traffic 'problem'."

The case deserves the attention of the Court.

Respectfully submitted,

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